

COURT SERVICES

ENDORSED

2012 NOV 29 3:31

RECEIVED  
CLERK OF COURT  
JAN 17 2013  
Mendocino County

1 Arthur A. Hartinger (SBN: 121521)  
ahartinger@meyersnave.com  
2 Linda M. Ross (SBN: 133874)  
lross@meyersnave.com  
3 Jennifer L. Nock (SBN: 160663)  
jnock@meyersnave.com  
4 MEYERS, NAVE, RIBACK, SILVER & WILSON  
5 555 12th Street, Suite 1500  
Oakland, California 94607  
Telephone: (510) 808-2000  
6 Facsimile: (510) 444-1108

7 Attorneys for Defendant  
City of San Jose

8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SANTA CLARA**

11 **SAN JOSE POLICE OFFICERS  
ASSOCIATION,**

12 **Plaintiff,**

13 **v.**

14 **CITY OF SAN JOSE, BOARD OF  
ADMINISTRATION FOR POLICE AND  
15 FIRE RETIREMENT PLAN OF CITY OF  
SAN JOSE, and DOES 1-10 inclusive.,**

16 **Defendants.**

17  
18 **AND RELATED CROSS-COMPLAINT  
AND CONSOLIDATED ACTIONS**  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. 1-12-CV-225926

*[Consolidated with Case Nos. 112CV225928,  
112CV226570, 112CV226574, 112CV227864]*

*Assigned for all purposes to the Honorable  
Patricia M. Lucas*

**DEFENDANT'S REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
MOTION FOR JUDGMENT ON THE  
PLEADINGS AS TO THE SAN JOSE  
POLICE OFFICERS' ASSOCIATION'S  
SEVENTH CAUSE OF ACTION FOR  
VIOLATION OF THE MEYERS-MILIAS-  
BROWN ACT; EXHIBITS A-F IN  
SUPPORT THEREOF**

Date: January 17, 2013  
Time: 9:00 a.m.  
Dept.: 2

**BY FAX**

Complaint Filed: June 6, 2012  
Trial Date: None Set

Case No. 1-12-CV-225926

DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

1 Defendant City of San Jose hereby requests the Court to take judicial notice pursuant to  
2 California Evidence Code Sections 450 *et seq.*, and in accordance with California Rules of Court  
3 3.1113, subdivision (l) and 3.1306, subdivision (c), of the following material, true and correct  
4 copies of which are attached hereto:

5 Exh. A: Full Text of Measure B: Article XV-A Retirement: Public Employee  
6 Pension Plan Amendments – To Ensure Fair and Sustainable Retirement  
7 Benefits While Preserving Essential City Services (referred as: “The  
8 Sustainable Retirement Benefits and Compensation Act”) [City Council  
9 Agenda Item No. 3.5(b) discussed on November 6, 2012];

10 Exh. B: *San Jose Police Officers’ Assoc. v. City of San Jose, and City of San Jose*  
11 *City Council: Notice of Application for Leave to Sue in Quo Warranto;*

12 Exh. C: *San Jose Police Officers’ Assoc. v. City of San Jose, and City of San*  
13 *Jose City Council: Application for Leave to Sue in Quo Warranto;*

14 Exh. D: *The People of the State of California on the Relation of San Jose Police*  
15 *Officers’ Association v. City of San Jose, and City Council of San Jose:*  
16 *Verified Complaint in Quo Warranto* [Code Civ. Proc. §803; Cal. Code Reg  
17 Title 11, Section 2(A)];

18 Exh. E: *San Jose Police Officers’ Association v. City of San Jose, and City of San*  
19 *Jose City Council: Memorandum of Points and Authorities in Support of*  
20 *SJPOA’s Application for Leave to Sue in Quo Warranto; and*

21 Exh. F: Letter dated September 28, 2012 regarding “*Quo Warranto* Application in  
22 *San Jose Police Officers’ Assn. v. City of San Jose and City of San Jose City*  
23 *Council* Your File No.: LA2012106837 File No. 038781” to Marc J. Nolan,  
24 Deputy Attorney General from Jonathan Yank of Carroll, Burdick &  
25 McDonough LLP.

26 Exhibit A is properly subject to judicial notice pursuant to California Evidence Code  
27 Sections 451(a) (“provisions of any charter described in Sections 3, 4, or 5 of Article XI of the  
28 California Constitution), 453, and 452(b) (providing that courts may take judicial notice of  
“legislative enactments issued by or under the authority of the United States or any public entity in  
the United States.”). *Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4<sup>th</sup> 1014, 1027 (“The  
Evidence Code also expressly provides for judicial notice of a public entity’s legislative

1 enactments and official acts. Thus, we may take notice of local ordinances and the official  
2 resolutions, reports, and other official acts of a city.”). Exhibits A, B, C, D, and E are properly  
3 subject to judicial notice pursuant to California Evidence Code Sections 453 and 452(h)  
4 (providing that courts may take judicial notice of “[f]acts and propositions that are not reasonably  
5 subject to dispute and are capable of immediate and accurate determination by resort to sources of  
6 reasonably indisputable accuracy.”). *See also Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App.  
7 4th 256, 265 (2011) (“[C]ourts have taken judicial notice not only of the existence and recordation  
8 of recorded documents but also of a variety of matters that can be deduced from the documents.”).

9 For these reasons, the City respectfully requests that the Court take judicial notice of the  
10 above-listed documents.  
11

12 DATED: November 28, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

13  
14 By: 

15 Arthur A. Hartinger  
16 Linda M. Ross  
17 Jennifer L. Nock  
18 Michael C. Hughes  
19 Attorneys for Defendant  
20 City of San Jose  
21  
22  
23  
24  
25  
26  
27  
28

2006567.1

## **EXHIBIT A**

**FULL TEXT OF MEASURE B**

**ARTICLE XV-A  
RETIREMENT**

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO  
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS  
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as:  
*"The Sustainable Retirement Benefits and Compensation Act."*

**Section 1501-A: FINDINGS**

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits – primarily health benefits – are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

February 8, 2012

Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

#### **Section 1502-A: INTENT**

This Act is intended to ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services to the residents of San Jose.

February 8, 2012

The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned and accrued for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree or to take away any cost of living increases paid to retirees as of the effective date of the Act.

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

#### **Section 1503-A. Act Supersedes All Conflicting Provisions**

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

February 8, 2012

**Section 1504-A.      Reservation of Voter Authority**

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

**Section 1505-A.      Reservation of Rights to City Council**

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

**Section 1506-A.      Current Employees**

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to



February 8, 2012

amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions.

**Section 1507-A: One Time Voluntary Election Program ("VEP")**

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

February 8, 2012

IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

- (i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.
- (ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.
- (iii) The current age of eligibility for service retirement under the existing plan as approved by the City

February 8, 2012

Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

- (iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.
- (v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.
- (vi) “Final compensation” shall mean the average annual pensionable pay of the highest three consecutive years of service.
- (vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

February 8, 2012

worked (including paid leave, but not including overtime).

(c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.

(d) VEP Survivorship Benefits.

(i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.

(ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.

(e) VEP Disability Retirement Benefits.

(i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

February 8, 2012

- (ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

**Section 1508-A: Future Employees – Limitation on Retirement Benefits – Tier 2**

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

- (a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

February 8, 2012

the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

February 8, 2012

(f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).

(g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

#### **Section 1509-A: Disability Retirements**

(a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

(b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:

(i) An employee cannot do work that they did before; and

February 8, 2012

(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.



February 8, 2012

**Section 1510-A: Emergency Measures to Contain Retiree  
Cost of Living Adjustments**

If the City Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees the City may adopt the following emergency measures, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(a) Cost of living adjustments ("COLAs") shall be temporarily suspended for all retirees in whole or in part for up to five years. The City Council shall restore COLAs prospectively (in whole or in part), if it determines that the fiscal emergency has eased sufficiently to permit the City to provide essential services protecting the health and well-being of City residents while paying the cost of such COLAs.

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

**Section 1511-A: Supplemental Payments to Retirees**

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets:

February 8, 2012

**Section 1512-A: Retiree Healthcare**

- (a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.
- (b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.
- (c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

**Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)**

- (a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.
- (b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

February 8, 2012

through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

(c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:

- (i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and
- (ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.

(d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:

- (i) the funding objectives and actuarial assumptions of the plans; and
- (ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

February 8, 2012

### **Section 1514-A: Savings**

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

### **Section 1515-A: Severability**

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

February 8, 2012

(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

ADOPTED this 6th day of March, 2012, by the following vote:

AYES:            CONSTANT,   HERRERA,   LICCARDO,   NGUYEN,  
                         OLIVERIO, PYLE, ROCHA; REED.

NOES:            CAMPOS, CHU, KALRA.

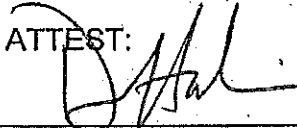
ABSENT:           NONE.

DISQUALIFIED:   NONE.



CHUCK REED  
Mayor

ATTEST:



DENNIS D. HAWKINS, CMC  
City Clerk

## **EXHIBIT B**

---

1 Gregg McLean Adam, No. 203436  
Jonathan Yank, No. 215495  
2 Jennifer S. Stoughton, No. 238309  
**CARROLL, BURDICK & McDONOUGH LLP**  
3 Attorneys at Law  
44 Montgomery Street, Suite 400  
4 San Francisco, CA 94104  
Telephone: 415.989.5900  
5 Facsimile: 415.989.0932  
Email: gadam@cbmlaw.com  
6 jyank@cbmlaw.com  
jstoughton@cbmlaw.com  
7

8 Attorneys for Proposed Relator  
San Jose Police Officers' Association

9 BEFORE THE ATTORNEY GENERAL  
10 OF THE STATE OF CALIFORNIA

11 SAN JOSE POLICE OFFICERS'  
12 ASSOCIATION,

13 Plaintiff-Relator,

14 v.

15 CITY OF SAN JOSE, and CITY OF  
16 SAN JOSE CITY COUNCIL,

17 Defendants.

No.

NOTICE OF APPLICATION FOR LEAVE TO  
SUE IN QUO WARRANTO

18 NOTICE IS HEREBY GIVEN that San Jose Police Officers' Association, the  
19 Proposed Relator, is applying to the Attorney General of the State of California for leave  
20 to sue in quo warranto.

21 Pursuant to Title XI, sections 1 and 2, of the California Code of Regulations,  
22 the following documents are enclosed:

- 23 1. a copy of Relator's Application for Leave to Sue in Quo Warranto;  
24 2. a copy of the [Proposed] Verified Complaint;  
25 3. a copy of the Verified Statement of Facts in Support of the  
26 Application; and  
27  
28



1 4. a Memorandum of Points and Authorities in Support of this  
2 Application.

3 FURTHER NOTICE IS HEREBY GIVEN that you have fifteen (15) days after  
4 service of this Notice to appear before the Attorney General and to show cause, if you  
5 have any, why leave to sue should not be granted in accordance with the Relator's  
6 Application.  
7

8 Dated: June 21, 2012

9 CARROLL, BURDICK & McDONOUGH LLP

10 By 

11 Gregg McLean Adam  
12 Jonathan Yank  
13 Jennifer Stoughton

14 Attorneys for Proposed Relator  
15 San Jose Police Officers' Association  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## **EXHIBIT C**

1 Gregg McLean Adam, No. 203436  
Jonathan Yank, No. 215495  
2 Jennifer S. Stoughton, No. 238309  
**CARROLL, BURDICK & McDONOUGH LLP**  
3 Attorneys at Law  
44 Montgomery Street, Suite 400  
4 San Francisco, CA 94104  
Telephone: 415.989.5900  
5 Facsimile: 415.989.0932  
Email: gadam@cbmlaw.com  
6 jyank@cbmlaw.com  
jstoughton@cbmlaw.com  
7

8 Attorneys for Proposed Relator  
San Jose Police Officers' Association

9 BEFORE THE ATTORNEY GENERAL  
10 OF THE STATE OF CALIFORNIA

11 SAN JOSE POLICE OFFICERS'  
12 ASSOCIATION,

13 Plaintiff-Relator,

14 v.

15 CITY OF SAN JOSE, and CITY OF  
16 SAN JOSE CITY COUNCIL,

17 Defendants.

No.

APPLICATION FOR LEAVE TO SUE IN QUO  
WARRANTO

18 TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:  
19

20 In accordance with Section 803 of the Code of Civil Procedure, application is  
21 hereby made by Proposed Relator San Jose Police Officers' Association, for leave to sue  
22 in quo warranto, in the name of the People of the State of California.

23 Pursuant to Title XI, section 2, of the California Code of Regulations, the  
24 following documents are enclosed:

- 25 1. an original and one copy of the [Proposed] Verified Complaint  
26 prepared for the signature of the Attorney General, a Deputy  
27 Attorney General, and the attorney for the Relator;
- 28 2. a Verified Statement of Facts in Support of this Application;

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

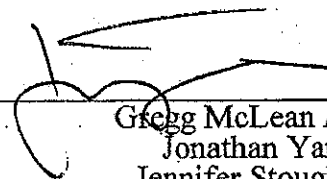
3. a Memorandum of Points and Authorities in Support of this Application;
4. a copy of a Notice directed to the proposed Defendant, advising them of this Application and giving them fifteen (15) days to appear and to show cause why leave to sue should not be granted; and
5. Proof of Service of the foregoing documents on the proposed

Defendant—to be added after service on proposed defendants.

Dated: June 21, 2012.

CARROLL, BURDICK & McDONOUGH LLP

By



Gregg McLean Adam  
Jonathan Yank  
Jennifer Stoughton

Attorneys for Proposed Relator  
San Jose Police Officers' Association

## **EXHIBIT D**

---

1 Gregg McLean Adam, No. 203436  
Jonathan Yank, No. 215495  
2 Jennifer S. Stoughton, No. 238309  
**CARROLL, BURDICK & McDONOUGH LLP**  
3 Attorneys at Law  
44 Montgomery Street, Suite 400  
4 San Francisco, CA 94104  
Telephone: 415.989.5900  
5 Facsimile: 415.989.0932  
Email: gadam@cbmlaw.com  
6 jyank@cbmlaw.com  
jstoughton@cbmlaw.com  
7

8 Attorneys for Plaintiff  
San Jose Police Officers' Association

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11  
12 THE PEOPLE OF THE STATE OF  
CALIFORNIA on the RELATION of  
13 SAN JOSE POLICE OFFICERS'  
ASSOCIATION,

14 Plaintiff,

15 v.

16 CITY OF SAN JOSE, and CITY  
17 COUNCIL OF SAN JOSE,

18 Defendants.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

No.

VERIFIED COMPLAINT IN *QUO WARRANTO*

[CODE CIV. PROC. § 803; CAL. CODE REG  
TITLE 11, SECTION 2(A)]

1 The People of the State of California, on the Relation of SAN JOSE POLICE  
2 OFFICERS' ASSOCIATION complain of Defendants, and for cause of action allege as  
3 follows:

4 1. This action is brought pursuant to Section 803 of the Code of Civil  
5 Procedure.

6 2. At all times herein mentioned, Defendant the CITY OF SAN JOSE ("the  
7 City"), was a municipal corporation existing, qualifying, and acting under a charter  
8 granted by the Legislature of the State of California and adopted pursuant to the  
9 Constitution of the laws of the State of California.

10 3. At all times herein mentioned, Defendant the CITY COUNCIL OF SAN  
11 JOSE ("City Council") was a municipal corporation existing, qualifying, and acting under  
12 a charter granted by the Legislature of the State of California and adopted pursuant to the  
13 Constitution of the laws of the State of California.

14 4. The relator in this action is the SAN JOSE POLICE OFFICERS'  
15 ASSOCIATION ("SJPOA", "Plaintiff" or "Relator").

16 **The Parties and Their Collective Bargaining**  
17 **Relationship Under the Meyers-Milias-Brown Act,**  
**Government Code Section 3500 et seq.**

18 5. Labor-management relations and the process of bargaining between the  
19 SJPOA and the City are governed by the Meyers-Milias-Brown Act ("the MMBA" or "the  
20 Act"), Government Code section 3500, et seq.

21 6. The SJPOA is, and was at all relevant times, a non-profit corporation  
22 organized and existing under the laws of the State of California, with its principal place of  
23 business in the County of Santa Clara. The SJPOA is the "recognized employee  
24 organization" for all police officer classifications in Bargaining Units 11, 12, 13 and 14  
25 (collectively "Police Officers") employed by the City of San Jose to work in the San Jose  
26 Police Department, pursuant to the Meyers-Milias-Brown Act, Government Code section  
27 3500 et. seq. ("MMBA"). As one of its functions, the relator represents public employees  
28 on matters related to their employment conditions, including wages and hours. Plaintiff's

1 approximately 1100 members perform all law enforcement functions for the nearly 1  
2 million residents of the City of San Jose.

3 7. By reason of the facts stated in the prior paragraph, the SJPOA is  
4 beneficially interested in the City's faithful performance of its obligations under the  
5 MMBA. The SJPOA brings this action on behalf of itself and its members, having  
6 standing to do so under the doctrine articulated by the California Supreme Court in  
7 *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of*  
8 *Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

9 8. At all times relevant, the City is and has been the employer of the  
10 SJPOA's members and a "public agency" within the meaning of the MMBA. As a charter  
11 city, in addition to being bound by the MMBA in regard to its labor-relations with the  
12 SJPOA, the City is governed by the San Jose City Charter.

13 9. The MMBA requires that the City meet and confer in good faith with the  
14 SJPOA over the wages, hours, and other terms and conditions of employment for Police  
15 Officers, including retirement benefits. (Gov. Code §§ 3504, 3505.) When negotiations  
16 result in agreement between the parties, the MMBA requires that the agreement be  
17 reduced to a mutually-signed writing known as a "memorandum of agreement" ("MOA").  
18 (Gov. Code § 3505.1.)

19 10. The MMBA further states that "knowingly providing a recognized  
20 employee organization with inaccurate information regarding the financial resources of  
21 the public employer, whether or not in response to a request for information, constitutes a  
22 refusal or failure to meet and negotiate in good faith." (Gov. Code § 3506.5(c).)

23 11. The MMBA also prohibits the City from taking unilateral action on  
24 matters impacting wages, hours, and other terms and conditions of employment for Police  
25 Officers without first providing the SJPOA with reasonable notice and an opportunity to  
26 bargain, resolve any differences, and reach agreement prior to implementation. (Gov.  
27 Code § 3504.5.) "The duty to bargain requires the public agency to refrain from making  
28 unilateral changes in employees' wages and working conditions until the employer and



1 employee association have bargained to impasse.” (*Santa Clara County Counsel*  
2 *Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537.) Thus, for example, it is well-  
3 established that an MMBA-covered city is “required to meet and confer with [a union  
4 representing impacted employees] before it propose[s] charter amendments which affect  
5 matters within their scope of representation.” (*People ex rel. Seal Beach Police Officers*  
6 *Assn. v. City of Seal Beach* (“*Seal Beach*”) (1984) 36 Cal.3d 591, 602.)

7 12. Where there is no imminent need to act prior to a deadline to place a  
8 proposed measure on an election ballot, doing so without first satisfying the bargaining  
9 obligation violates Government Code section 3504. (*Santa Clara County Registered*  
10 *Nurses Assoc.* (2010) PERB Decision No. 2120-M, pp. 15-16.)<sup>1</sup> In order to demonstrate  
11 that financial difficulties create a compelling operational necessity permitting unilateral  
12 action prior to satisfying the bargaining obligation, the employer must demonstrate “an  
13 actual financial emergency which leaves no real alternative to the action taken and allows  
14 no time for meaningful negotiations before taking action.” (*Id.* at p.16.) “The mere fact  
15 that [a public employer] thought the inclusion of the measure on the ... ballot was  
16 desirable does not constitute a compelling operational necessity sufficient to set aside its  
17 bargaining obligation.” (*Id.* at 17.)

18 13. Even after bargaining has reached a state of impasse, the bargaining  
19 obligation does not end permanently. Rather, “impasse is always viewed as a temporary  
20 circumstance and the impasse doctrine ... therefore, is not a device to allow any party to  
21 continue to act unilaterally or to engage in the disparagement of the collective bargaining  
22 process.” (*McClatchy Newspaper* (1996) 321 NLRB 1386, 1398-1390.) “An impasse  
23 does not constitute a license to avoid the statutory obligation to bargain collectively where  
24 the circumstances which led to the impasse no longer remain in status quo.” (*Kit*

25  
26 <sup>1</sup> The Public Employment Relations Board (“PERB”) is the California administrative  
27 agency generally charged with construing and administering the MMBA. (Gov. Code §§  
28 3501 and 3509.) While PERB does not have jurisdiction over cases involving labor  
associations representing police officers (Gov. Code § 3511), Courts give great deference  
to its construction of the MMBA. (*Banning Teachers Assn. v. Public Employment*  
*Relations Bd.* (1988) 44 Cal.3d 799, 804-805.)

1 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*  
2 (1962) 138 NLRB 1290, 1294.) Thus, "[a]nything that creates a new possibility of fruitful  
3 discussion (even if it does not create a likelihood of agreement) breaks an impasse." (*Gulf*  
4 *States Mfg. Inc. v. N.L.R.B.* (5th Cir. 1983) 704 F.2d 1390, 1399 [citations omitted].)<sup>2</sup>  
5 Thus, when a party has made a significant bargaining concession, impasse will be broken.  
6 Likewise, when an employer's financial condition has improved substantially, impasse  
7 will be broken. (See, e.g., *Kit Manufacturing Co., Inc. and Sheet Metal Workers Int'l*  
8 *Assoc., Local 213, AFL-CIO* (1962) 138 NLRB 1290, 1294-1295.)

9 14. On or about March 6, 2012, the defendants submitted to the electorate of  
10 the City of San Jose a ballot measure designed to dramatically reduce the pension  
11 benefits of SJPOA-represented Police Officers by forcing current employees into a new  
12 retirement plan that, *inter alia*, severely reduces accrual rates, dramatically increases  
13 minimum retirement age and service requirements, cuts the maximum cost-of-living  
14 adjustment in half (from 3% to 1.5%), and slashes survivorship and disability retirement  
15 benefits.

16 15. On or about June 5, 2012, a majority of the electorate approved the  
17 foregoing resolution. The charter amendment thus approved was thereafter filed with the  
18 Secretary of State.

19 16. The proceedings described in Paragraphs 14 and 15, which were taken by  
20 the defendants to amend its charter, were defective and violative of Government Code §  
21 3500 *et seq.* in that defendants (1) failed to meet and confer in good faith with the SJPOA  
22 to discuss the proposed cuts to the benefits prior to arriving at the ballot measure and  
23 engaged in bad-faith bargaining by, *inter alia*, insisting that the SJPOA was required to  
24 convince the City to undo its *fait accompli* and asserting that the City was under no

25 <sup>2</sup> Decisions by the federal courts and the National Labor Relations Board ("NLRB")  
26 construing the Labor Management Relations Act are persuasive in construing similar  
27 California labor relations statutes. (See, e.g., *Modesto City*, 136 Cal.App.3d at 895-896; *J.*  
28 *R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874, 908.) Decisions interpreting similar  
provisions of other California labor statutes are also persuasive. *County Sanitation Dist.*  
*No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 572-573.

1 obligation to bargain with the SJPOA in any event, (2) deliberately overstated the extent  
2 of its pension liabilities—by in excess of \$250 million dollars—to create enormous public  
3 and media pressure on the SJPOA to make concessions and inhibit the parties' ability to  
4 reach agreement (which is a per se unfair labor practice pursuant to Government Code  
5 section 3506.5) and (3) failed and refused to return to bargaining on the asserted basis that  
6 the parties were at impasse even after significantly changed circumstances required a  
7 ~~resumption of bargaining, including an improved financial outlook for the City, greatly~~

8 improved pension fund performance, and significant monetary concessions by the SJPOA.  
9 These allegations are set forth in further detail below.

10 **The Defendants Violated the Meyers-Milias-Brown Act, Government Code**  
11 **Section 3500 *et seq.*, by Deciding to Place Measure B Before the Voters Without**  
12 **First Providing the SJPOA With Notice and an Opportunity to Bargain**

13 17. In the spring and early summer of 2011, during collective bargaining  
14 negotiations, SJPOA and the City had lengthy negotiations over retirement benefits. The  
15 parties agreed to create a program through which current employees could voluntarily  
16 choose to opt out of the current level of pension benefits into a lower level of benefits  
17 (“the SJPOA opt-in”).

18 18. The parties also agreed that either side could continue to “meet and  
19 confer” (the technical term for collective bargaining and used herein interchangeably with  
20 the term “bargaining”) on pension and retiree health care benefits for current and future  
21 employees, notwithstanding that they had reached an agreement on other terms and  
22 conditions of employment.

23 19. Notwithstanding this agreement, and almost before the ink on it was dry,  
24 the City’s Mayor, Chuck Reed, began a campaign to have the City Council declare a fiscal  
25 emergency.

26 20. Concurrently, the Mayor and other City Council members proposed a  
27 ballot measure that would unilaterally reduce retirement benefits of all city employees,  
28 including those represented by SJPOA. On May 13, 2011, the City published a  
Memorandum re: Fiscal Concerns wherein Mayor Chuck Reed asserted that the City’s

1 pension costs were projected to grow to \$650 million annually by 2016 and recommended  
2 that the City Council approve a ballot measure to amend the San Jose City Charter to  
3 dramatically decrease retirement benefits for current retirees and current/future employees,  
4 as well as to require voter approval of future increases in retirement benefits for these  
5 same employees. The Mayor recommended setting a maximum level of retirement  
6 benefits (that, in some cases, were less than current employees and retirees earn currently)  
7 ~~that could not be exceeded without voter approval.~~

8 21. At a meeting on May 24, 2011, the City Council approved the Mayor's  
9 recommendation and directed City Council staff to draft a proposed ballot measure that, if  
10 approved by the voters of the City of San Jose, would implement the Mayor's  
11 recommendations.

12 22. The Mayor began a frenzied political and media campaign warning of  
13 impending fiscal disaster for the City as a result of projections for escalating pension  
14 costs. The Mayor and his staff repeatedly asserted, including in official city documents  
15 put forward as part of the City's bargaining position, that by Fiscal Year 2015-16, the  
16 City's retirement contribution could reach \$650 million per year, from a 2010-11 level of  
17 \$245 million in Fiscal Year 2010-2011. This figure was used approximately 38 times,  
18 including in press releases and interviews in the New York Times and Vanity Fair  
19 magazine.

20 23. Throughout these discussions, the City continued to represent that its  
21 pension costs were projected to increase annually to approximately \$650 million by 2016.  
22 As detailed below, these representations were knowingly false and without basis.

23 24. As recently as February 24, 2012, the Mayor asserted that the City's  
24 pension liability could still reach \$650 million by 2015-16.

25 25. In response to the City's ballot measure, SJPOA and other San Jose labor  
26 unions invoked their statutory and City Charter rights to meet and confer about the ballot  
27 measure. Concurrently, SJPOA, in coalition with IAFF, Local 230 ("Local 230"),  
28

1 representing firefighters employed by the City of San Jose, bargained over retirement  
2 benefits and the SJPOA opt-in.

3 26. In mid-July, the SJPOA and the City began bargaining over retirement  
4 benefits. The negotiations concerned retirement benefits, the ballot measure and SJPOA's  
5 opt-in.

6 27. Throughout the meet and confer process, the City's position was that it  
7 would vote on sending the ballot measure to the public at a Special Election, planned for  
8 March 2012.

9 28. The original ground rules contemplated that the parties would complete  
10 bargaining on the July 5, 2011 ballot measure by October 31, 2011. Thereafter, if no  
11 agreement had been reached, the parties would enter mediation.

12 29. The negotiations were made more difficult by the City's own  
13 acknowledgement that the changes to retirement benefits being proposed by the ballot  
14 measure were of questionable legal validity.

15 30. Despite the difficulty, over the following four (4) months, the parties met  
16 and conferred at least 13 times, including on July 13, August 2, 25, 30, and 21, September  
17 13, 15, and 27, and October 5, 12, 14, 17, and 20. During the Retirement Negotiations,  
18 the parties bargained over various proposals put forth by the SJPOA and the City  
19 regarding retirement generally, along with bargaining about the specific language of the  
20 proposed ballot measure. In the course of the negotiations, the City passed proposals on  
21 the following subjects unrelated to the ballot measure: Retirement benefits for New  
22 Employees; Retiree Healthcare Benefits For New Employees; Supplemental Retiree  
23 Benefit Reserve ("SRBR"); Healthcare Cost Sharing; and Workers' Compensation Offset.  
24 For example, the City proposed to change the retirement benefits for new employees, such  
25 that the pension benefits formula for employees hired after April 1, 2012 would be 1.5%  
26 per year of service, subject to a maximum of 60% of final compensation, and raising the  
27 retirement year to 60 years old. The City also proposed to cap any cost of living  
28

1 adjustments to 1% per fiscal year and to limit the City's maximum contribution to 9% of  
2 pensionable compensation.

3 31. The SJPOA, in conjunction with the other labor unions, also made  
4 various proposals in the course of bargaining unrelated to the ballot measure. For  
5 example, on September 26, 2011, they proposed a three-tier retirement model that  
6 maintained the *status quo* for active employees but created a second tier for new hires and  
7 opt-ins with reduced retirement benefits.

8 32. The parties met and conferred until approximately October 31, 2011, but  
9 unfortunately were unable to reach an agreement. On November 15-16, 2011, the parties  
10 participated in mediation in an effort to resolve their differences. The mediation was not  
11 successful.

12 33. Following mediation, in the run up to the Council's planned vote, the  
13 City significantly changed its ballot proposal on November 22, 2011. In an email to all  
14 employees, the City Manager Debra Figone described the revised ballot measure as "far  
15 different than the earlier versions."

16 34. On November 11, November 18 and December 1, 2011, SJPOA and  
17 Local 230 (described herein collectively as "the Unions") put forward new proposals  
18 significantly amending their prior proposal. The Unions asked to resume bargaining over  
19 the revised ballot measure and the Unions' revised proposals. But the City refused to  
20 bargain, or deviate from its original plan to vote on its proposed ballot measure on  
21 December 6.

22 35. No bargaining has taken place at any time over the City's revised  
23 November 22, 2011 ballot measure or the Unions' proposals of November 11, November  
24 18 and December 1, 2011.

25 36. On December 1, 2011, the independent actuary for the Retirement Plan  
26 issued an updated report with projections for prospective City retirement contributions.  
27 The report showed that the City's retirement contributions would be far less than  
28 previously estimated and far less than the City had been relying on as justification for both

1 its proposed Declaration of a Fiscal Emergency and its ballot measure. The report showed  
2 that—just for the Police and Fire Retirement Plan—the City’s contributions for Fiscal  
3 Year 2012-13 would be approximately \$55 million *less than* previously expected.

4 37. On approximately December 5, 2011, the Mayor withdrew his proposal  
5 to have the City Council declare a Fiscal State of Emergency.

6 38. But notwithstanding the Unions’ new proposals or the greatly reduced  
7 pension contribution projections, the City Council voted to place the November 22, 2012  
8 ballot measure before the voters.

9 39. On December 6, 2011, the City Council adopted Resolution 76087 and  
10 approved a ballot measure for the June 2012 election ballot, which, *inter alia*, would  
11 implement dramatic reductions in Police Officers’ retirement benefits beginning June 24,  
12 2012. The draft ballot measure language approved by the City Council was prepared on  
13 December 5, 2011, and though largely based on the November 22 version, was approved  
14 by the Council the following day, without providing the SJPOA with notice and an  
15 opportunity to bargain, as required by the MMBA. (Gov. Code § 3504.5 [requiring notice  
16 and opportunity to bargain before adoption of “ordinance, rule, resolution, or regulation  
17 directly relating to matters within the scope of representation proposed to be adopted by  
18 the governing body”]; *Seal Beach, supra*, 36 Cal.3d at 602.)

19 40. The ballot measure language approved by the City Council on December  
20 6, 2011, dramatically reduces the pension benefits of SJPOA-represented Police Officers  
21 by forcing current employees into a new retirement plan that, *inter alia*, severely reduces  
22 accrual rates, dramatically increases minimum retirement age and service requirements,  
23 cuts the maximum cost-of-living adjustment in half (from 3% to 1.5%), and slashes  
24 survivorship and disability retirement benefits. Police Officers who elect not to go into  
25 the misnomered “Voluntary Election Program,” would be punished by slashing their  
26 salaries and requiring that they pay 50% of existing unfunded liabilities.

27 41. The City took the unusual step, however, of seeking to put the ballot  
28 measure before the voters in June of 2012, not March 2012, as previously planned. The

1 City Council then essentially directed City staff to engage in after-the-fact mediation—but  
2 not bargaining—with the SJPOA and other City unions.

3 42. The SJPOA subsequently met with the City on two occasions in late  
4 December, 2011 and early January 2012, but the City refused to agree to bargain, taking  
5 the position that the parties remained at impasse.

6 43. On February 21, 2012, the City, through its Director of Labor Relations,  
7 ~~provided the SJPOA with a copy of a revised version of its ballot measure and informed~~  
8 the SJPOA that the City Council intended to take a final vote on language for a June 2012  
9 ballot measure at its regularly-calendared session on March 6, 2012. *Inter alia*, the  
10 measure language was amended to move its effective date to June 23, 2013.

11 44. On February 24, 2012, the SJPOA made a request to bargain about the  
12 February 21, 2012 ballot measure. The letter noted that the February 21, 2012 revised  
13 measure contained significant changes from the December 6, 2011 version and  
14 specifically referenced a concession by the City Manager that it contained “many  
15 significant changes and movement from earlier drafts.” The SJPOA noted that it “had no  
16 opportunity to bargain about this new ballot language.”

17 45. On February 27, 2012, the City’s Labor Relations Director, Alex Gurza  
18 responded to the SJPOA’s February 24 communication by conditioning any resumption of  
19 bargaining on the Association (1) making a concession that the City deemed in its  
20 subjective opinion to be “sufficient” and (2) that such concession be capable of being  
21 “ratified prior to March 6.”

22 46. On March 2, 2012, SJPOA and Local 230 presented a new proposal—  
23 designed to meet the City’s concern about the un-guaranteed nature of prior union  
24 proposals—which guaranteed tens of millions of dollars in savings to the City annually.

25 47. The City rejected the proposal on March 5, 2012—*i.e.*, within 72 hours—  
26 without any meeting or bargaining about the proposal.  
27  
28



1           48. On March 6, 2012, the San Jose City Council adopted a resolution to  
2 place the February 21, 2012 version of the pension ballot measure on the June 2012  
3 election ballot.

4           49. The ballot measure language approved by the City Council on March 6,  
5 2012, dramatically reduces the pension benefits of SJPOA-represented Police Officers in  
6 the same ways as the prior version approved by the City Council on December 6, 2011.  
7 ~~The February 21, 2012 version of the pension reduction ballot measure adopted by the~~

8 City Council on March 6, 2012 also includes new language dictating that the City will file  
9 as lawsuit seeking a declaration as to the legality of the various pension reduction  
10 provisions delineated in the measure.

11           50. These actions and plans were made by the City unilaterally and without  
12 providing the SJPOA with notice and an opportunity to "meet and confer ... before [the  
13 City] proposed charter amendments which affect matters within their scope of  
14 representation." (*Seal Beach, supra*, 36 Cal.3d at 602.)

15  
16           **The City Misrepresented Its Projected Pension Costs and Pushed  
Toward Declaring a So-Called "Fiscal State of Emergency"**

17           51. On April 13, 2011, San Jose Mayor Chuck Reed and Vice Mayor Nguyen  
18 issued a press release announcing that "San José's retirement director has projected that  
19 [pension] costs could rise to \$650 million per year by fiscal year 2015-2016 ...." This  
20 statement knowingly and recklessly misrepresented the City's potential pension liability.

21           52. On May 13, 2011, the City published a Memorandum re: Fiscal Concerns  
22 wherein Mayor Chuck Reed asserted that the City's pension costs were projected to grow  
23 to \$650 million annually by 2016. Again, there was no basis for this assertion.

24           53. The \$650 million figure was communicated by the Mayor and the City  
25 again and again in press releases, reports, and official City documents until approximately  
26 mid-November 2011.

27           54. The communications referenced in the preceding paragraphs were made  
28 even though the City's retirement director—the only source for the \$650 estimation

1 according to the Mayor—had expressly disavowed any \$650 million projection and had  
2 told the Mayor and the City that it should NOT be relied upon. The City had no other  
3 actuarially sound basis for projecting a \$650 million pension projection for 2015-16.

4 55. The intent of the City in continuing to communicate the false \$650  
5 million projection was to whip-up public, media and political sentiment to support the  
6 City's plan to declare a fiscal emergency (discussed *infra*) and slash retirement and other  
7 ~~benefits for Police Officers and other City civil servants. At all times that these~~

8 representations were made, the City was aware that they were false and without any  
9 reasonable actuarial basis, such that the City "knowingly providing [the SJPOA] with  
10 inaccurate information regarding the financial resources of the public employer ...  
11 constitute[d] a refusal or failure to meet and negotiate in good faith." (Gov. Code  
12 § 3506.5(c).)

13 56. On February 8, 2012, NBC Channel 11, a San Jose area television station  
14 produced an investigative report alleging that the City had deliberately overstated its  
15 potential pension liability for political reasons. The report suggested that the City's  
16 overstatements were deliberate, and designed to support both the Mayor's budget proposal  
17 and his proposal for the Declaration of Fiscal Emergency. To wit, in an interview with  
18 NBC, when asked the basis for the \$650 million city pension liability projection, Mayor  
19 Reed acknowledged that the sole source for the \$650 million figure was the City's  
20 Retirement Services Director, Russell Crosby. In the same interview, Mr. Crosby stated  
21 about the \$650 million estimation: "That was a number off the top of my head." He also  
22 stated that: "The Mayor was told not to use that number ... that the number was 400  
23 [million dollars]."

24 57. In fact, on approximately February 21, 1012, the City's own retirement  
25 system's actuaries estimated that the actual future projection figure for Fiscal Year 2015-  
26 16 is approximately \$310 million, less than half the level the City had consistently and  
27 knowingly misrepresented. In light of the developments regarding the City's improved  
28 financial condition and the dramatically-reduced projections of retirement related costs

1 over the next few years, any ostensible bargaining impasse was broken. (See *Kit*  
2 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*  
3 (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition  
4 breaks impasse].)

5 58. Undeterred, as recently as February 24, 2012, Mayor Reed was still  
6 publicly estimating that the City's pension liability could reach \$650 million.

7 59. On February 28, 2012, five California State Assembly members and two  
8 State Senators requested that the California Legislature's Joint Legislative Audit  
9 Committee conduct an audit into the City's general finances and current and future  
10 pension obligations ("the State audit request"). They asked that: "The audit should focus  
11 on all projections used by the City and/or its elected officials that include, but may not be  
12 limited to, \$400 million, \$431 million, \$570 million, and \$650 million."

13 60. On March 7, 2012, the State of California's Joint Legislative Audit  
14 Committee ordered a state audit to determine, *inter alia*, whether the Mayor, City Council,  
15 or other officials engaged in any wrongdoing or legal violations in referencing the false  
16 \$650 million projection. The committee directed the state auditor to give the audit  
17 priority status.

18  
19 **The City Continued to Refuse to Bargain Even After Its So-Called "Fiscal State of  
Emergency" Proved to be a Myth**

20 61. As noted above, on approximately February 21, 2012, the City revised its  
21 estimate for the City's pension liability projection for Fiscal Year 2015-16 to  
22 approximately \$310 million, less than half the level the City had consistently and  
23 knowingly misrepresented. In light of the developments regarding the City's improved  
24 financial condition and the dramatically-reduced projections of retirement related costs  
25 over the next few years, any ostensible bargaining impasse was broken. (See *Kit*  
26 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*  
27 (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition  
28 breaks impasse].)

62. Despite these revelations, the City continued to refuse to meet and confer with the SJPOA regarding its proposed ballot measure.

63. At all times mentioned herein, the defendants were able to perform its obligations under the MMBA. Notwithstanding such ability, the defendants failed and refused to perform its statutory duty under the MMBA.

64. Instead, the defendants submitted to the electorate of the City of San Jose a ballot measure designed to dramatically reduce the pension benefits of SIPOA-represented Police Officers, over which there had been no bargaining.

65. As the ballot measure passed on June 5, 2012, commencing on or about June 6, 2012, defendants have undertaken to act under color of the above-described defective and invalid charter amendment and, in doing so, has usurped, intruded into, and unlawfully held and exercised powers not belonging to it.

## PRAYER

WHEREFORE, Plaintiff prays for the following relief:

1. For judgment determining that the above-described charter amendment is null and void and of no legal effect and that the defendants have unlawfully usurped the powers of the state of California in undertaking to act under color of the amendment; and

2. For any and all actual, consequential, and incidental damages according to proof, including but not limited to damages that have been or may be suffered by members of the SJPOA and all costs incurred by the SJPOA in attempting to invoke the statutory rights of the association and its members;

3. For attorneys' fees pursuant to California Code of Civil Procedure § 1021.5, Government Code § 800, or otherwise;

4. For costs of suit herein incurred and other fines pursuant to California Code of Civil Procedure § 809; and

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

5. For such costs and further relief as the Court deems just and proper.

Dated: \_\_\_\_\_, 2012

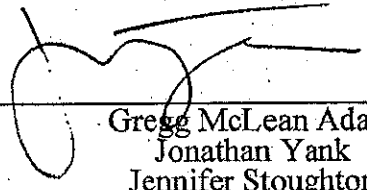
By \_\_\_\_\_  
Attorney General for the State of California

Dated: \_\_\_\_\_, 2012

By \_\_\_\_\_  
Deputy Attorney General for the State of California

Dated: June 21, 2012

CARROLL, BURDICK & McDONOUGH LLP

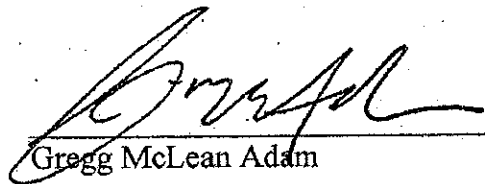
By  \_\_\_\_\_  
Gregg McLean Adam  
Jonathan Yank  
Jennifer Stoughton  
Attorneys for Relator  
San Jose Police Officers' Association  
Attorneys for the People of the State of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VERIFICATION

I, Gregg McLean Adam, am the relator in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of June, 2012 at San Francisco, California.

  
Gregg McLean Adam

## **EXHIBIT E**

1 Gregg McLean Adam, No. 203436  
Jonathan Yank, No. 215495  
2 Jennifer S. Stoughton, No. 238309  
**CARROLL, BURDICK & McDONOUGH LLP**  
3 Attorneys at Law  
44 Montgomery Street, Suite 400  
4 San Francisco, CA 94104  
Telephone: 415.989.5900  
5 Facsimile: 415.989.0932  
Email: gadam@cbmlaw.com  
6 jyank@cbmlaw.com  
jstoughton@cbmlaw.com  
7

8 Attorneys for Proposed Relator  
San Jose Police Officers' Association

9 BEFORE THE ATTORNEY GENERAL  
10 OF THE STATE OF CALIFORNIA

11 SAN JOSE POLICE OFFICERS'  
12 ASSOCIATION,

13 Plaintiff-Relator,

14 v.

15 CITY OF SAN JOSE, and CITY OF  
16 SAN JOSE CITY COUNCIL,

17 Defendants.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

No.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF SJPOA'S  
APPLICATION FOR LEAVE TO SUE IN  
QUO WARRANTO**



TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTUAL HISTORY .....	1
III. DISCUSSION .....	5
A. Standards for Granting Leave to Sue in <i>Quo Warranto</i> .....	5
B. Pursuant to the Meyers-Milias-Brown Act, the City Was Required to <del>Bargain With the SJPOA Prior to Deciding to Place Measure B Before</del> the Voters, But It Failed to Fulfill This Obligation.....	7
C. The City's Failure to Bargain Constitutes an Illegal Exercise of a Franchise Which Is Only Remedied Through an Action in <i>Quo Warranto</i> .....	8
D. The SJPOA's Proposed Action in <i>Quo Warranto</i> Is of Great Importance to the Citizens of This State.....	10
IV. CONCLUSION .....	11

## TABLE OF AUTHORITIES

Page

### STATE CASES

<i>Banning Teachers Assn. v. Public Employment Relations Bd.</i> (1988) 44 Cal.3d 799 .....	7
<i>Betts v. Board of Administration</i> (1978) 21 Cal.3d 859 .....	7
<i>California State Employees' Assn.</i> (1996) 51 Cal.App.4th 923 .....	5, 8
<i>City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753</i> (1999) 71 Cal.App.4th 82 .....	9
<i>Claremont Police Officers Ass'n v. City of Claremont</i> (2006) 39 Cal.4th 623 .....	7
<i>International Assoc. of Firefighters v. City of Oakland</i> (1985) 174 Cal.App.3d 687 .....	6, 9, 10
<i>Kern v. City of Long Beach</i> (1947) 29 Cal. 2d 848 .....	10
<i>Oakland Municipal Improvement League v. City of Oakland</i> (1972) 23 Cal.App.3d 165 .....	9
<i>People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach</i> (1984) 36 Cal.3d 591 .....	7, 8, 9, 11
<i>Taylor v. Cole</i> (1927) 201 Cal. 327 .....	9

### PERB DECISIONS

<i>Santa Clara County Registered Nurses Assoc.</i> (2010) PERB Decision No. 2120-M.....	7, 8
--	------

### STATE STATUTES

California Code of Civil Procedure	
Section 803 .....	5, 9
Government Code	
Section 3500 <i>et seq.</i> (Meyers-Milias-Brown Act) .....	1, 2, 5, 6, 7, 8, 10
Section 3501 .....	7
Section 3504 .....	7
Section 3504.5 .....	7
Section 3505 .....	7
Section 3509 .....	7
Section 3511 .....	7

### OTHER AUTHORITIES

17 Opinions of the California Attorney General 46 .....	6
17 Opinions of the California Attorney General 136 .....	6
19 Opinions of the California Attorney General 46 .....	6
19 Opinions of the California Attorney General 87 .....	6

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

24 Opinions of the California Attorney General 146..... 6  
25 Opinions of the California Attorney General 237..... 6  
76 Opinions of the California Attorney General 169..... 6, 8, 9, 10, 11

**CONSTITUTIONS**

California Constitution, Article 1, Section 9..... 10

1    **I.    INTRODUCTION**

2            Proposed Relator San Jose Police Officers' Association ("Relator" or  
3    "SJPOA") hereby applies for leave to sue in *quo warranto* because the proposed  
4    Defendants, City of San Jose and the San Jose City Council (collectively "the City"), have  
5    proceeded with a ballot measure designed to dramatically cut employee pension benefits  
6    without first completing the collective bargaining process with the SJPOA, as required by  
7    the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3500 *et seq.*<sup>1</sup> This  
8    measure, which was entitled "Measure B" on the ballot, was passed by the San Jose  
9    electorate on June 5, 2012. The City's actions were illegal under longstanding case  
10   precedent, and the issue is one of great importance to the citizens of this State, making an  
11   action in *quo warranto* proper.

12   **II.   FACTUAL HISTORY**

13            On April 13, 2011, the City of San Jose and Mayor Chuck Reed began a push  
14   to declare a "fiscal emergency," when Mayor Reed and Vice Mayor Nguyen issued a  
15   press release announcing that "San José's retirement director has projected that [pension]  
16   costs could rise to \$650 million per year by fiscal year 2015-2016 ...." (Verified  
17   Statement of Facts ("VSOF"), ¶ 4.) The City then published a Memorandum re: Fiscal  
18   Concerns on May 13, 2011, wherein Mayor Reed reiterated these assertions. (VSOF, ¶5.)

19            On June 20, 2011, the SJPOA and the City agreed to bargain over retirement  
20   benefit reforms and the Mayor's anticipated—but as yet unseen—ballot measure with the  
21   somewhat optimistic goal of reaching an agreement by October 31, 2011.<sup>2</sup> (VSOF, ¶10.)  
22   Over the following four months, the parties met approximately 13 times.<sup>3</sup> (VSOF, ¶¶ 13-  
23

24   \_\_\_\_\_  
25   <sup>1</sup> The MMBA (Gov. Code § 3500, *et seq.*) is the statutory scheme giving rise to and  
governing labor-management relations between the SJPOA and the City.

26   <sup>2</sup> The SJPOA did not waive its right to bargain over the City's ballot reform measures in  
the event negotiations were not completed by that date. (VSOF, ¶ 10.)

27   <sup>3</sup> The SJPOA was bargaining in coalition with firefighters represented by IAFF, Local  
28   230. (VSOF, ¶ 10.)

1 14) During these negotiations, the parties bargained over various proposals put forth by  
2 both the SJPOA and the City regarding pension reforms generally, as well as about the  
3 specific language of the City's then-proposed ballot measure. (VSOF, ¶ 14.)

4 Despite the City's repeated declarations that it was facing a "fiscal emergency"  
5 and its duty under the MMBA to bargain with the SJPOA over the proposed ballot  
6 measure, the City refused to engage in such further bargaining after October 31, 2011.  
7 (VSOF, ¶ 15.) The City's refusal to bargain is underscored by the fact that the SJPOA

8 continued to make efforts to meet and confer, continued to make concessionary proposals,  
9 and never represented that any of its proposals were its last, best and/or final offer.  
10 (VSOF, ¶ 15.) For example, on November 11, the SJPOA sent the City a revised  
11 "Retirement Reform Proposal" that contained various concessions from its prior proposal,  
12 including a lower retirement tier for new employees, a voluntary program to shift  
13 employees from the City's retirement plan to a CalPERS retirement plan with reduced  
14 benefits, and reductions in benefits for those who do not elect to move to CalPERS.  
15 (VSOF, ¶ 15a.) Merely one week later, the SJPOA sent another proposal to the City,  
16 which would seek to achieve the same savings without shifting individuals to CalPERS  
17 and satisfy the City's desire to enshrine the pension reforms in the City Charter. (VSOF,  
18 ¶ 15b.)

19 During this same timeframe, on November 15 and 16, 2011, the parties  
20 participated in mediation, throughout which the City continued to maintain that the parties  
21 were at impasse and insisted it was under no obligation to bargain with the SJPOA.  
22 (VSOF, ¶ 17.) The mediation was unsuccessful.

23 But on November 22, 2011, the City unveiled a significantly-changed proposed  
24 ballot measure. (VSOF, ¶ 19.) It differed from an earlier version the City passed on  
25 October 27, 2011 in several ways, including (for current employees) changing the annual  
26 accrual rates, minimum retirement ages, and costs of living adjustments. (VSOF, ¶¶ 19-  
27 20.) Indeed, in a November 22, email to all employees, City Manager Debra Figone  
28

1 described the revised ballot measure as "far different than the earlier version." (VSOF,  
2 ¶ 20.)

3 Wishing to respond and bargain over the City's newly-refined ballot measure,  
4 on December 1, 2011, SJPOA President Jim Unland sent a letter to Deputy City Manager  
5 Alex Gurza containing a Revised SJPOA "Retirement Proposal" reflecting further  
6 monetary concessions by the SJPOA, including a rollback to the retirement plan in place  
7 in 1997. (VSOF, ¶ 21.) The City still refused to meet and confer with the SJPOA.

8 continuing to assert that the parties were at impasse. (VSOF, ¶ 22.)

9 At the same time, the independent actuaries for the City's Police and Fire  
10 Retirement System produced revised projections showing that the City's retirement  
11 contribution to that system in Fiscal Year 2012-13 would be \$55 million *less than*  
12 previously predicted. (VSOF, ¶ 23.) The Mayor immediately scrapped plans to declare a  
13 "fiscal emergency" at the City Counsel meeting on December 6, 2011. (VSOF, ¶ 24.)  
14 But at that same meeting, the City Council, without providing the SJPOA with notice or  
15 an opportunity to bargain, approved yet another revised measure (drafted on December 5)  
16 for placement on the June 2012 election ballot. (VSOF, ¶ 25.) Thereafter, the City  
17 continued to insist that the parties remained at impasse, in spite of repeated pleas by the  
18 SJPOA to resume bargaining and concessionary offers by the SJPOA worth tens of  
19 millions of dollars per year. (VSOF, ¶¶ 26-28.)

20 While continuing to refuse to bargain with the SJPOA, Mayor Reed admitted  
21 in a February 9, 2012 televised interview on NBC Channel 11 that, all along, the sole  
22 source for the \$650 million figure was an isolated oral statement by the City's Retirement  
23 Services Director, Russell Crosby. (VSOF, ¶ 29.) But in an interview that was part of the  
24 same news story, Mr. Crosby stated that the \$650 million estimation "was a number off  
25 the top of my head" and "[t]he Mayor was told not to use that number, that the number  
26 was 400 [million dollars], that was the projection." (VSOF, ¶ 29.) In fact, in February  
27 2012, the City retirement system's actuaries projected that pension costs for Fiscal Year  
28

1 2015-16 will be approximately \$310 million, *less than half* of the amount the City had  
2 been publicizing. (VSOF, ¶ 32.)

3 Even though it was then clear that the City lacked any basis for its alleged  
4 “fiscal crisis,” on February 21, 2012, the City’s Director of Labor Relations provided the  
5 SJPOA with yet another version of the City’s “Pension Plan Amendments” ballot  
6 proposition and informed the SJPOA that the City Council would take a final vote on  
7 March 6, 2012 to place it on the June 2012 election ballot. (VSOF, ¶ 30.) In a

8 memorandum attached to the draft, City Manager Debra Figone admitted that it contained  
9 “many significant changes and movements from earlier drafts.” (VSOF, ¶ 31.) These  
10 included, *inter alia*, changes to the penalties that would accrue for individuals who did not  
11 “volunteer” for the new reduced tier. (VSOF, ¶¶ 30-31.) The new version also included  
12 new language moving the effective date for one key provision to June 23, 2013. (VSOF,  
13 ¶ 30.)

14 On February 24, 2012, the SJPOA sent a letter to Deputy City Manager Alex  
15 Gurza requesting that the City reconvene bargaining in light of the foregoing admission  
16 and the fact that the SJPOA “had no opportunity to bargain about this new ballot  
17 language.” (VSOF, ¶ 33.) But in a February 27, 2012 response, Deputy City Manager  
18 Alex Gurza expressly conditioned any resumption of bargaining on the SJPOA (1) making  
19 a concession that the City deemed, in its subjective opinion, to be “sufficient” and (2) that  
20 such concession be capable of being “ratified prior to March 6.” (VSOF, ¶ 34.)

21 In an attempt to meet the City’s demands, the SJPOA sent a new proposal to  
22 the City on March 2, 2012 that guaranteed tens of millions of dollars in savings per year to  
23 the City. (VSOF, ¶¶ 36-37.) The City responded on March 5, 2012 by admitting that the  
24 SJPOA had made significant movement on a number of issues. (VSOF, ¶ 38.)  
25 Nonetheless, the City rejected the SJPOA’s request to resume bargaining because,  
26 according to the City, the timing of the proposal “render[ed] further bargaining  
27 impractical [before] March 6<sup>th</sup>—the final City Council meeting before the last date to  
28 place this measure on the June 2012 ballot.” (VSOF, ¶ 38.)

1 On March 6, 2012, the San Jose City Council passed a resolution ordering that  
2 the "Pension Plan Amendments" ballot proposition be placed on the June 5, 2012 ballot.  
3 (VSOF; ¶ 39.) At the meeting, the City counsel also added to the ballot proposition a  
4 provision dictating that, if adopted by the voters, the City would file a lawsuit seeking a  
5 declaratory judgment on the legality of its various pension reduction provisions. (VSOF,  
6 ¶ 39.) Measure B was printed on the June 2012 ballot, and passed by the San Jose  
7 electorate on June 5, 2012. (VSOF, ¶ 41.)

8 Consequently, despite a significant change in City's financial projections  
9 regarding retirement costs, the City vastly changing the language of its ballot measure  
10 during the relevant time frame, and repeated concessionary proposals by the SJPOA, the  
11 City refused to bargain with the SJPOA over the ballot measure from November 2011  
12 until March 6, 2012, when the City Council voted to approve the ballot measure going to  
13 the voters. In taking these unilateral actions without satisfying its bargaining obligation,  
14 the City committed a *per se* refusal to bargain under the MMBA. (See *California State*  
15 *Employees' Assn.* (1996) 51 Cal.App.4th 923, 934.)

### 16 III. DISCUSSION

#### 17 A. Standards for Granting Leave to Sue in *Quo Warranto*

18 California Code of Civil Procedure section 803 states:

19 An action may be brought by the attorney-general, in the name of  
20 the people of this state ... upon a complaint of a private party,  
21 against any person who usurps, intrudes into, or unlawfully holds or  
22 exercises any public office, civil or military, or any franchise, or  
23 against any corporation, either de jure or de facto, which usurps,  
24 intrudes into, or unlawfully holds or exercises any franchise, within  
25 this state. And the attorney-general must bring the action, whenever  
he has reason to believe that any such office or franchise has been  
usurped, intruded into, or unlawfully held or exercised by any  
person, or when he is directed to do so by the governor.

26 "In determining whether to grant leave to sue in quo warranto the Attorney General  
27 considers (1) whether the application has raised a substantial question of fact or issue of  
28



1 law which should be decided by a court and (2) whether it would be in the public interest  
2 to grant leave to sue.” (76 Ops. Cal. Atty. Gen. 169, 171)

3 It should be borne in mind that in passing on applications for leave to  
4 sue in quo warranto, the Attorney General ordinarily does not decide  
5 the issues presented, but determines only whether or not there is a  
6 substantial question of law or fact which calls for judicial decision.

7 (25 Ops. Cal. Atty. Gen. 237, 240 (emphasis added) [citing 17 Ops. Cal. Atty. Gen. 46,  
8 47; 24 Ops. Cal. Atty. Gen. 146, 151-52]; see also 19 Ops. Cal. Atty. Gen. 87; 17 Ops.  
9 Cal. Atty. Gen. 136; 19 Ops. Cal. Atty. Gen. 46.)

10 The California courts agree with this position. For example, in *International*  
11 *Assoc. of Firefighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698, the Court of  
12 Appeal stated the following:

13 [I]n a case within a statute authorizing the attorney general or state’s  
14 attorney to institute the proceeding, or apply for leave of court to  
15 institute it, at the insistence of private persons, if private rights or  
16 grievances are involved, the consent of the officer is essential, but  
17 he has no arbitrary and uncontrolled discretion; the only discretion  
18 vested in him is to determine whether the documents and evidence  
19 presented to him are in proper legal form and prima facie sufficient,  
20 and, if they are, it is his duty to sign the petition and present it to the  
21 court.

22 In the present case, the proposed Relator has shown it has a *prima facie* case  
23 against the City for its illegal actions. The proposed complaint, the facts summarized  
24 *supra*, and the discussion below set forth that the City failed to satisfy its obligation to  
25 meet and confer with the SJPOA before putting a ballot measure which amended the  
26 City’s charter up for a vote. As stated previously by the California Attorney General,  
27 “[w]hether [a charter] amendment is valid or not presents substantial questions of fact and  
28 law with respect to the actions of the parties in complying with the provisions of the  
MMBA.” (76 Ops. Cal. Atty. Gen. 169, 172.) Therefore, it is clear that the proposed  
Relator’s application contains substantial questions of law and fact.

1           **B. Pursuant to the Meyers-Milias-Brown Act, the City Was Required to**  
2           **Bargain With the SJPOA Prior to Deciding to Place Measure B**  
3           **Before the Voters, But It Failed to Fulfill This Obligation**

4           Under the MMBA, a city is "required to meet and confer with [an impacted  
5           union] before it propose[s] charter amendments which affect matters within their scope of  
6           representation." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*  
7           (1984) 36 Cal.3d 591, 602 [emphasis added]). "A public employee's pension constitutes  
8           an element of compensation" (*Betts v. Board of Administration* (1978) 21 Cal.3d 859,

9           863) and, as such, is a mandatory subject of bargaining (*Claremont Police Officers Ass'n*  
10          *v. City of Claremont* (2006) 39 Cal.4th 623, 634). Here, the SJPOA is the exclusive  
11          bargaining representative under the MMBA for City-employed police officers. (VSOF,  
12          ¶ 2.)

13          Consequently, for purposes of proposing a charter amendment that would  
14          impact the pension rights of the City's police officers, the City must meet and confer in  
15          good faith with the SJPOA over the proposed amendment. (Gov. Code §§ 3504, 3505).  
16          The City cannot unilaterally reduce police officers' benefits through a charter amendment  
17          without providing the SJPOA with reasonable notice and a full opportunity to bargain,  
18          resolve any differences, and reach agreement prior to implementation. (Gov. Code §  
19          3504.5.) Moreover, the City's duty to bargain is not reduced or excused simply because it  
20          may have believed the proposed charter amendment was important in light of its alleged  
21          fiscal crisis. (See *Santa Clara County Registered Nurses Assoc.* ("Santa Clara Nurses")  
22          (2010) PERB Decision No. 2120-M, p. 17 ["The mere fact that [a public employer]  
23          thought the inclusion of the measure on the ... ballot was desirable does not constitute a  
24          compelling operational necessity sufficient to set aside its bargaining obligation."])<sup>4</sup>

25          <sup>4</sup> The Public Employment Relations Board ("PERB") is the California administrative  
26          agency generally charged with construing and administering the MMBA. (Gov. Code §§  
27          3501 and 3509.) While PERB does not have jurisdiction over cases involving labor  
28          associations representing police officers (Gov. Code § 3511), courts give great deference  
29          to its construction of the labor statutes within its purview. (*Banning Teachers Assn. v.*  
30          *Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804-805.)

1           Given its duties under the MMBA, the City could only vote the pension reform  
2 measure onto the ballot after bargaining to agreement or impasse with the SJPOA. (See  
3 *Santa Clara Nurses*, PERB Decision No. 2120-M, at p.14 [“the County breached its duty  
4 to meet and confer in good faith when it failed to bargain the Prevailing Wage Measure to  
5 agreement or impasse prior to placing it on the ballot”].) While the parties obviously did  
6 not reach an agreement, they also did not reach an impasse over the City’s pension reform  
7 proposals, as evidenced by the City’s repeated (and admitted) revisions to those proposals

8 and the SJPOA’s repeated efforts to meet and confer and make concessionary proposals,  
9 as detailed above. Placing the proposed charter amendments on the ballot without  
10 bargaining to agreement or impasse was a violation of the MMBA. Indeed, prior to  
11 reaching impasse “[a]n employer’s unilateral change in terms and conditions of  
12 employment within the scope of representation is, absent a valid defense, a per se refusal  
13 to negotiate ....” (*California State Employees’ Assn.*, *supra*, 51 Cal.App.4th at 934  
14 [emphasis added].) Because the City did not reach an impasse with the SJPOA, it was  
15 required to continue bargaining, and its failure to do so while changing the terms and  
16 conditions of the City’s police officers’ retirement and disability benefits constitutes a  
17 violation of the MMBA.

18           In light of the foregoing, the SJPOA has presented a prima facie case that the  
19 City improperly placed Measure B before the San Jose electorate and, consequently,  
20 whether the charter amendments to be effected by Measure B are valid. And “[w]hether  
21 [a charter] amendment is valid or not presents substantial questions of fact and law with  
22 respect to the actions of the parties in complying with the provisions of the MMBA” and  
23 satisfies the prerequisites to suing in *quo warranto*. (76 Ops. Cal. Atty. Gen. 169, 172.)

24           **C. The City’s Failure to Bargain Constitutes an Illegal Exercise of a**  
25           **Franchise Which Is Only Remedied Through an Action in *Quo***  
26           ***Warranto***

27           As noted *supra*, the Supreme Court held that a charter city must comply with  
28 the meet and confer requirements of the MMBA before it proposes an amendment  
concerning the terms and conditions of public employment to its charter. (*Seal Beach*, 36

1 Cal.3d at 602.) And it is well established that, for purposes of suing under Code of Civil  
2 Procedure section 803 ("Section 803"), "[a] city charter is ... a franchise. ...[and i]t has  
3 long been held that the proper remedy to attack the validity of a city charter amendment is  
4 through a quo warranto action." (76 Ops. Cal. Atty. Gen. 169, 171 [citing *Seal Beach*,  
5 *supra*, 36 Cal.3d at 595]; *Oakland Municipal Improvement League v. City of Oakland*  
6 (1972) 23 Cal.App.3d 165, 168-169.)

7 ~~[P]ublic corporations of any character whatsoever, exercising~~  
8 governmental functions, do so by reason of a delegation to them of  
9 a part of the sovereign power of the state. Where they are claiming  
10 to act and are actually functioning without having complied with the  
11 necessary prerequisites, they are usurping franchise rights as against  
paramount authority, to complain of which it lies only within the  
right of the state itself.

12 (*Int'l Ass'n of Fire Fighters, supra*, 174 Cal.App.3d at 694 [quoting *Van Wagener, supra*,  
13 58 Cal.App. at 120.] "Since an action in the nature of quo warranto will lie to test the  
14 regularity of proceedings by which municipal charter provisions have been adopted, it  
15 follows that, once those provisions have become effective, their procedural regularity may  
16 be attacked *only* in quo warranto proceedings." (*Id.* at 694 [emphasis added] [citing  
17 *Taylor v. Cole* (1927) 201 Cal. 327, 333, 338-340])

18 Thus, the Attorney General has "upon prior occasions granted leave to sue in  
19 quo warranto in charter amendment challenges" similar to the present matter. (76 Ops.  
20 Cal. Atty. Gen. at 172 [citing *Seal Beach, supra*, 36 Cal.3d at 595]; see also *City of Fresno*  
21 *v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 89 [citing  
22 76 Ops. Cal. Atty. Gen. 169].) In fact, as recently as June 11, 2012, the Attorney General  
23 granted leave to sue in *quo warranto* to the Bakersfield Police Officers Association in a  
24 matter with close similarities to the present matter, where the association alleged that the  
25 City of Bakersfield failed to comply with its meet and confer obligation prior to placing a  
26 pension reform measure before the city's electorate.

27 Under the above-referenced authorities, an action in *quo warranto* is the  
28 necessary and proper procedure to challenge the validity of Measure B and its revisions to

1 the San Jose City Charter. The SJPOA alleges and has presented a *prima facie* case that  
2 the City of San Jose usurped the franchise rights granted to it by the State of California  
3 when it refused to meet and confer or otherwise bargain with the SJPOA about its  
4 proposed charter amendments prior to placing Measure B before the San Jose electorate.  
5 These prerequisites having been met, the SJPOA's Application for Leave to Sue in  
6 *Quo Warranto* should be granted. (*Int'l Ass'n of Fire Fighters, supra*, 174 Cal.App.3d at  
7 698 ["the only discretion vested in [the Attorney General] is to determine whether the

8 documents and evidence presented to him are in proper legal form and *prima facie*  
9 sufficient, and; if they are, it is his duty to sign the petition and present it to the court"].)  
10 "[w]hether [a charter] amendment is valid or not presents substantial questions of fact and  
11 law with respect to the actions of the parties in complying with the provisions of the  
12 MMBA." (76 Ops. Cal. Atty. Gen. 169, 172.)

13  
14 **D. The SJPOA's Proposed Action in *Quo Warranto* Is of Great  
Importance to the Citizens of This State**

15 The MMBA reflects the strong public policy of the State of California of  
16 avoiding labor strife and ensuring that labor disputes are settled through the processes  
17 delineated. (See Gov. Code § 3500; *International Assn. of Fire Fighters Union v. City of*  
18 *Pleasanton* (1976) 56 Cal.App.3d 959, 968.) Thus, the crux of the dispute—i.e., whether  
19 the City satisfied its obligations under the MMBA—not only implicates the rights of  
20 hundreds of thousands of municipal employees throughout California, but the broader  
21 public policy served by California's labor relations statutes.

22 Moreover, because Measure B would reduce pension benefits for current  
23 employees and retirees, it implicates benefits that are indisputably subject to protection  
24 under the "contracts" <sup>5</sup> clause of the California State Constitution. (*Kern v. City of Long*  
25 *Beach* (1947) 29 Cal. 2d 848, 851-53 ["...public employment gives rise to certain  
26 obligations which are protected by the Contract Clause of the Constitution..."].) Thus, a

27  
28 <sup>5</sup> Cal. Const., Art. I, Sec. 9 ("a ... law impairing the obligation of contracts may not be  
passed.").

1 determination as to the propriety of the charter amendments called for in Measure B is  
2 likely to impact the rights and obligations of employees and their employers throughout  
3 the State of California.

4 In light of these broad policy implications, the California Attorney General has  
5 previously concluded in matters similar to the present controversy that it is in the public  
6 interest to permit suit in *quo warranto*. (76 Ops. Cal. Atty. Gen. 169, 172 ["We believe  
7 that *Seal Beach* governs here and that the same public interest and purposes are present: to

8 resolve important questions of fact and law and to settle labor strife in the public sector.];  
9 June 11, 2012 Attorney General Decision No. 11-702 ["we conclude that the question of  
10 Measure D's validity, and that of the [pension] ordinances it gave rise to, are matters of  
11 public interest, and that it would therefore serve the public interest for them to be  
12 properly adjudicated"].) As in those instances, leave to sue in *quo warranto* should be  
13 granted here.

#### 14 IV. CONCLUSION

15 For the foregoing reasons, the San Jose charter amendments enacted on the  
16 June 5, 2012 ballot constitute an illegal exercise of a franchise by the City and a public  
17 harm. *Quo warranto* is the proper and exclusive method for remedying this harm.  
18 Therefore, the SJPOA respectfully requests that its application for leave to sue in quo  
19 warranto be granted.

20  
21 Dated: June 21, 2012

22 CARROLL, BURDICK & McDONOUGH LLP

23  
24 By \_\_\_\_\_

25 Gregg McLean Adam  
26 Jonathan Yank  
27 Jennifer Stoughton  
28 Attorneys for Proposed Relator  
San Jose Police Officers' Association

## **EXHIBIT F**

September 28, 2012

Carroll, Burdick & McDonough LLP

44 Montgomery Street

Suite 400

San Francisco, CA

94104-4606

415.989.5900

415.989.0932 Fax

www.cbmlaw.com

Los Angeles

Sacramento

Jonathan Yank  
Direct Dial: 415.743.2413  
jyank@cbmlaw.com

**VIA EMAIL AND REGULAR MAIL**

Marc J. Nolan  
Deputy Attorney General  
Department of Justice  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013

**Re: Quo Warranto Application in *San Jose Police Officers' Assn.*  
*v. City of San Jose and City of San Jose City Council*  
Your File No.: LA2012106837  
File No. 038781**

Dear Mr. Nolan:

We write in response to your letter, dated September 18, 2012, in which you requested information pertaining to six other legal actions regarding the recently-passed "Measure B" in the City of San Jose. To the extent such information is known to the San Jose Police Officers' Association ("the SJPOA"), the information you requested is provided below. However, as indicated in the SJPOA Reply papers, not one of these other legal actions seeks, or is capable of delivering, the relief requested here on behalf of the SJPOA.

You specifically requested information about Santa Clara Superior Court Case No. 1-12-CV-220795. That matter, which was filed by our office on behalf of the SJPOA, sought to enjoin placement of Measure B on the June 5, 2012 ballot, as well as an order compelling the City of San Jose to resume bargaining with the SJPOA over pension reform proposals. Preliminary injunctive relief was denied in that matter and, because Measure B was passed by the voters, the case is now moot. Furthermore, the operative pleading cannot be amended to seek the relief requested in the SJPOA's proposed *quo warranto* action (i.e., rescission of now-effective changes to the San Jose City Charter). "Since an action in the nature of *quo warranto* will lie to test the regularity of proceedings by which municipal charter provisions have been adopted, it follows that, once those provisions have become effective, their procedural regularity may be attacked *only* in *quo warranto* proceedings." (*International Assoc. of Firefighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694 [citing *Taylor v. Cole* (1927) 201 Cal. 327, 333, 338-340].)



Marc J. Nolan

Re: Quo Warranto Application in *San Jose Police Officers' Assn., v. City of San Jose and City of San Jose City Council*

Your File No.: LA2012106837

September 28, 2012

Page 2

Santa Clara Superior Court Case No. 1-12-CV225926 was filed by our office on behalf of the SJPOA to challenge the *substantive legality* of only *particular amendments* to the San Jose City Charter brought about by the passage of Measure B. (See Exhibit B to Holtzman Declaration.) It does not and cannot (for the reasons stated *supra*) attack the *procedural validity* of Measure B, and it does not seek to invalidate *all of Measure B*. Thus, this lawsuit does not address and cannot redress the violations of the Meyers-Millias-Brown Act ("MMBA") (Gov Code § 3500 *et seq.*) at issue in the SJPOA's proposed *quo warranto* action.<sup>1</sup>

The SJPOA is unaware of the status of the remaining four legal actions, all of which are before the California Public Employment Relations Board ("PERB"). However, based on my experience as a practitioner of public sector labor law, the process of taking cases from start to finish at PERB is extremely long and laborious.<sup>2</sup> More critically, as pointed out in the Reply, the SJPOA is not a party to those matters and PERB has no jurisdiction over the SJPOA or its labor relations with the City of San Jose. (Gov. Code § 3511.)

We hope this information is of some assistance. Please do not hesitate to contact the undersigned if you have any additional questions or concerns.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP



Jonathan Yank

JY:jag

cc: Kamala D. Harris, Attorney General  
Jonathan V. Holtzman, Esq.  
Jim Unland, President, SJPOA

---

<sup>1</sup> As the City of San Jose noted in its Opposition, Case No. 1-12-CV225926 does charge a violation of the MMBA. However, the challenge is substantive, not procedural—it alleges that one provision of Measure B purports to unlawfully narrow the mandatory scope of bargaining in violation of the MMBA.

<sup>2</sup> The process includes a prehearing settlement conference, hearing (i.e., an administrative trial), post-hearing briefing, a decision by an administrative law judge, an appeal to the PERB Board itself, and an appeal to the California Court of Appeal. This entire process, depending on the case, can take years.

1 Arthur A. Hartinger (SBN: 121521)  
ahartinger@meyersnave.com  
2 Linda M. Ross (SBN: 133874)  
lross@meyersnave.com  
3 Jennifer L. Nock (SBN: 160663)  
jnock@meyersnave.com  
4 Michael C. Hughes (SBN: 215694)  
mhughes@meyersnave.com  
5 MEYERS, NAVE, RIBACK, SILVER & WILSON  
555 12th Street, Suite 1500  
6 Oakland, California 94607  
Telephone: (510) 808-2000  
7 Facsimile: (510) 444-1108  
8 Attorneys for Defendant  
City of San Jose  
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SANTA CLARA

12 SAN JOSE POLICE OFFICERS'  
ASSOCIATION,

13 Plaintiff,

14 v.

15 CITY OF SAN JOSE, BOARD OF  
16 ADMINISTRATION FOR POLICE AND  
17 FIRE RETIREMENT PLAN OF CITY OF  
SAN JOSE, and DOES 1-10 inclusive.

18 Defendants,  
19

20  
21 AND RELATED CROSS-COMPLAINT  
22 AND CONSOLIDATED ACTIONS  
23

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,  
112CV226570, 112CV226574, 112CV227864]

Assigned for all purposes to the Honorable Patricia  
M. Lucas

**[PROPOSED] ORDER FOR JUDGMENT ON  
THE PLEADINGS AS TO THE SAN JOSE  
POLICE OFFICERS' ASSOCIATION'S  
SEVENTH CAUSE OF ACTION FOR  
VIOLATION OF THE MEYERS-MILIAS-  
BROWN ACT**

Date: January 17, 2013  
Time: 9:00 a.m.  
Courtroom: 2

Complaint Filed: June 6, 2012  
Trial Date: None Set

24 This matter came on regularly for hearing on January 17, 2013 before the Honorable  
25 Patricia M. Lucas, Judge of the Superior Court of California, County of Santa Clara. Arthur  
26 Hartinger and Linda M. Ross appeared on behalf of the Defendants City of San Jose. Stephen  
27 Silver appeared on behalf of the San Jose Retired Employees Association, Howard E. Fleming,  
28 Donald S. Macrae, Frances J. Olson, Gary J. Richert and Rosalinda Navarro.

1           The Court, having considered all papers filed in support and in opposition, and oral  
2 arguments, hereby GRANTS Defendant's motion on the pleadings to dismiss Plaintiffs' Seventh  
3 Cause of Action for violation of the Meyers-Milias-Brown Act.

4           The motion is granted without prejudice.

5  
6 Dated: \_\_\_\_\_, 2013

\_\_\_\_\_  
The Honorable Patricia M. Lucas  
San Jose Superior Court

7  
8 2009919.1  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28